



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 234 of 2004**

**ADNAN MERDIN..... PLAINTIFF**

**- VERSUS-**

**HASAN CETIN & HATICE CETIN.....  
DEFENDANT**

**RULING**

This application is brought by way of a chamber summons dated and filed on 5<sup>th</sup> May, 2004. it is made under O.XXXVIII rules 1,2,5,6 and 12 of the Civil Procedure Rules, and seeks orders-

1. That this court be pleased to issue a warrant of arrest of the 1<sup>st</sup> defendant, Hasan Cetin, and order him to be brought before this court to show cause why he should not furnish security for his appearance;

2. That this court be pleased to order the 1<sup>st</sup> defendant Hasan Cetin to deposit in court money or other property or bank Guarantee or such other security in the sum of US\$200,000

**for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that maybe passed against the defendants in the suit; and 3. That the costs of this application be in the cause.**

**The application is based on the grounds that the plaintiff has commenced proceedings against the defendants claiming US\$169,850 plus costs and interest as per the plaint filed herein; that the defendants are ordinarily resident outside Kenya but the first defendant Hasan Cetin is currently in Kenya; that the said Hasan Cetin is due to leave Kenya in the next few days without attending to the plaintiff's claim; that the said Hasan Cetin has no assets in Kenya other than his investments in a limited liability Company known as Newline Limited; and that the said Hasan Cetin has plans to**

sell the said company and the assets thereof and thereby defeat any decree that may be passed against him. The application is supported by the annexed affidavit of ADNAN MERDIN, the plaintiff herein.

In his replying affidavit, the first defendant sets out, from paragraph 5 to paragraph 13, the business relationship between him and the plaintiff. According to this affidavit, the company known as

Newline Limited was incorporated by the 1 and 2 defendants. Prior to its incorporation, the first defendant had met the plaintiff who at the time was un-employed and was eager for any form of employment. The two being fellow Turkish nationals, the first defendant considered recruiting the plaintiff as a general manager of their company and proceeded to do so by a letter dated 27<sup>th</sup> November, 1998. The plaintiff executed the duties of general manager and at no time did he invest in the operations of the company. Without authority, he appointed a Mr. Shenga as Company Secretary of New line Limited. Mr. Cetin further accuses the plaintiff of peddling various falsehoods about his employment by New line Limited, including a false statement in a tax certificate to the effect that he is the Managing Director of New line Limited, whereas the truth is that only the defendants are directors of the company. Upon inquiry, the defendants established that the plaintiff has engaged himself in other businesses which he attends to during the time when he should be discharging his duties to New line Limited, and uses employees of New line Limited to carry out various

3

tasks. Consequently, it was no longer feasible to retain him in the employment.

It is the defendant's further case that on 27<sup>th</sup> March, 2004 the plaintiff was formally requested to resign and after detailed discussion the parties agreed that the plaintiff's employment would be terminated on 1<sup>st</sup> April, 2004; that in gratitude for the plaintiff's services to the company the defendant would waive a debt of US\$28,000 which the plaintiff had incurred, and that an ex gratia payment of US\$30,000 would be paid to the plaintiff. This agreement was reduced into writing wherein it is acknowledged that the plaintiff was at all times an employee of Newline Limited. There was never any agreement that the plaintiff would participate in sharing profits. Mr. Cetin further avers that the sums pleaded by the plaintiff in the plaint are false. He concludes by stating that the plaintiff was never employed by the defendants in their individual capacities, and that the alleged partnership and/or right to share in profits of Newline Limited was created after the plaintiff's employment was terminated.

Mr. Ojiambo, counsel for the plaintiff/applicant, made a lengthy submission. In summary, the applicants' case is that the first defendant is a Turkish and resides out of the country. He is not resident in Kenya and he was last here in 2001. He only comes on a visitor's pass and then goes away. It is quite possible in those circumstances that, with this suit against him, he might choose never to come back in which case the plaintiff would lose irretrievably. The defendants reside in Turkey with which Kenya has no reciprocal arrangement for enforcement of judgments. If any decree is passed against them, it will be rendered infructuous because the defendants have no assets in Kenya except their investment in Newline Limited.

In his response, Mr. Ngatia, counsel for the first defendant, relied entirely on the replying affidavit of the first defendant. He also made a lengthy submission whose synopsis is that the foundation of the plaintiff's suit is that there was a partnership between the plaintiff and the defendants and yet

there is no evidence of a partnership. All the documentary evidence points to an employer and employee relationship, and the employer is a Limited Liability Company which is not a party to this suit. He also submitted that there was no

evidence that the business founded in 1998 is about to be sold and all there was is a bare allegation. Before the plaintiff can obtain an order, he has to establish a cause of action which is unimpeachable, and that has not been done in this case. He finally submitted that the court cannot disregard the issue whether this is a litigable dispute, and whether the suit is bona fide. He also said that the court cannot order security for less than US\$200,000 because that is what is requested, otherwise the court cannot order any other sums.

In reply, Mr. Ojiambo submitted that the plaintiff was not relying on employment otherwise he would have sued the company. Rather, he was relying on a partnership agreement which was made before the company was incorporated.

Having heard the submissions of counsel for the respective parties, the main issues are whether the first defendant is about to leave the country as feared by the plaintiff, whether the company, Newline Limited, is about to be disposed of, and whether there was, indeed, a partnership agreement between the parties. As for the allegation that the first defendant is about to leave the country, I can only observe that in the plaintiff's affidavit sworn on 5<sup>th</sup> May,

2004, the plaintiff averred that the first defendant proposed to leave the country by 6<sup>th</sup> May, 2004. Almost a month later, he is still in the country. Instead, he has assured this court on oath that he will attend court any time he is required to do so. Otherwise he is in and out of the country as his company is doing a roaring business.

As for the allegation that Newline is about to be disposed of, the plaintiff has relied heavily on hearsay. No evidence has been adduced before the court in support of the assertion.

The third and most important matter is with regard to the issue of partnership vis-a-vis employment. This court is of the view that the plaintiff's suit can succeed only if the issue of a partnership between the plaintiff and the defendants is resolved in favour of the plaintiff. Section 3(1) of the partnership Act defines partnership as "the relation which subsists between persons carrying on business in common with a view of profit." Even though the plaintiff alleges that he entered into a partnership agreement with the defendants in July, 1998, no prima facie evidence of this agreement has been placed before the court.

7

Contrary to the plaintiff's allegation, the first defendant avers in his replying affidavit that the relationship between the parties was, until the end of March, 2004, that of employer and employee, the plaintiff, having been employed by Newline Limited, a company all of whose shares are owned by the two defendants who are also husband and wife. In support of this position, the first defendant has

produced a copy of a letter dated 27<sup>th</sup> November, 1998 addressed to the plaintiff, in part, as follows-

"Dear Adnan

RE: Employment as General Manager

We take this opportunity to engage your services within our organization in the above capacity.

As regards your terms of employment, you will be entitled to a monthly salary of Ksh. 15,000/= until confirmation. Upon confirmation of your employment, the company will adjust your salary to an amount agreed between you and the directors. This would depend on the performance of the company.

8

Any future salary increase on your part will be tied up to the cost of living and the performance of the salary..."

Signed. Hasan Cetin, Director.

The responsibilities of the general manager are enumerated in the letter. The letter therefore shows that the plaintiff was offered employment in the 1<sup>st</sup> defendant's organization, and he was to be paid monthly salaries.

Mr. Ojiambo for the applicant said that there was no evidence that the plaintiff accepted the employment. However, this submission runs against the tide of the evidence before the court. By a letter CHC-3" in the first defendant's bundle) dated 11<sup>th</sup> January, 1999, the plaintiff wrote to a Mr. Syata appointing him as a shop attendant. The letter is signed by the plaintiff as a general manager. On 22<sup>nd</sup> June, 1999 he wrote another letter to the supervisor, Bridgestone Security Services, and signed it as general manager. On 29<sup>th</sup> September, 1999 he wrote yet another letter as general manager to Judith and Irene, presumably employees, warning them of their conduct. He wrote another letter in the same capacity to

9

Oyatta and associates, advocates on 21<sup>st</sup> July, 2000. This was followed by yet another one, in the same capacity, to Kencell on 15<sup>th</sup> November, 2000. He also wrote another one as general manager on 16<sup>th</sup> February, 2001 to Kencell Communications. This would tend to confirm beyond reasonable doubt that the plaintiff was offered employment as a general manager at a monthly salary, and that he accepted it.

The plaintiff has not produced any evidence at all to establish, prima facie, that there was any agreement for a partnership. And yet, the existence of a partnership is the foundation and goes to the very root of his claim against the defendants. Order 38 rule 1 (b) of the Civil Procedure Rules under which this application is made states-

"Where at any stage of a suit... the court is satisfied by affidavit or otherwise... that the defendant is about to leave Kenya under circumstances affording reasonable

probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant of arrest../'

Commenting on this rule, in his treatise on Civil Procedure,

Mulla says-

"Where the defendant is about to leave India (read Kenya), it is not necessary to prove any intent on his part to obstruct or delay the execution of any decree ...

It is enough if the circumstances afford that any decree passed against him in the suit will thereby be obstructed. The court must however, be satisfied on two points.

- (1) that the plaintiff has a cause of action which is prima facie unimpeachable, subject to his proving the allegations in the plaint and
- (2) the court should have reason to believe on adequate materials that unless jurisdiction is exercised there is real danger that the defendant will remove himself from the ambit of the powers of the court.

Both these conditions must be satisfied. I must confess that there is

nothing on record from which this court can infer a partnership between the parties. In all the documents placed before the court,

11

no reference is made to any partnership. Indeed, the issue of partnership is first mentioned in the letter from the plaintiff's advocate dated 3<sup>rd</sup> April, 2004. This was a good three days after the plaintiff had signed the conditions of severance agreed upon between him and Hasan Cetin, the first defendant. If there was a partnership issue, it should have been thrashed out in this agreement, or even earlier, but it was not. And with the claim for a partnership agreement coming almost seven years after the company was formed, this court is not satisfied that there is a cause of action which is prima facie unimpeachable. There is no evidence that the company is being sold, and the first defendant has assured the court on oath that he would attend court at all times required. The total effect of all the circumstances herein is that this court does not think that the plaintiff is entitled to the orders he has sought. His application is accordingly dismissed with costs to the first defendant. Dated and delivered at Nairobi this 7<sup>th</sup> day of June, 2004

